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Office Memorandum • UNITED STATES GOVERNMENT

TO : MEMORANDUM FOR THE RECORD

DATE: 20 April 1953

FROM : 25X1A

SUBJECT: The Effective Date of the Appointment of [REDACTED] as Deputy Director of Central Intelligence.

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1. A question has arisen as to the effective date of [REDACTED] proposed appointment as Deputy Director of Central Intelligence. [REDACTED] presently occupies the position of Director of the Joint Staff of the JCS and is entitled while in this position to hold the rank and grade of Lieutenant-General. In the event that delay results in obtaining Senate confirmation of [REDACTED] appointment, it is possible that his successor as Director of the Joint Staff may relieve him. It would appear that [REDACTED] relinquishment of the position of Director of the Joint Staff would result in his immediate reversion to the grade of Major-General.

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2. Section 102(b)(2) of the National Security Act of 1947, as amended by Public Law 15 of the 83rd Congress, provides that the Deputy Director shall "continue to hold rank and grade not lower than that in which serving at the time of his appointment...." In his present rank and grade as Lieutenant-General, [REDACTED] military pay and allowances are slightly in excess of the statutory salary for Deputy Director. If [REDACTED] reverts to the grade of Major-General prior to the confirmation of his appointment, and issuance of the commission by the President pursuant thereto, his military pay and allowances will be somewhat less than the statutory salary for Deputy Director. The foregoing, therefore, raises the legal question as to when [REDACTED] "appointment" should be deemed to have been made.

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3. Two decisions of the Comptroller General of the United States bear upon the subject question. In the first of these, reported in 17 Comp. Gen. 249 (September 14, 1937), the Comptroller General quoted an earlier decision of the Comptroller of the Treasury in which it was stated:

"The nomination is not an appointment; neither is the confirmation. The nomination and confirmation serve but to indicate the purpose of the President to appoint and the consent of the Senate that the appointment may be made thereafter. They do not divest the Executive authority of the discretion to withhold the actual appointment. That discretion may be exercised at any time before the commission is actually signed. The signing of the commission, after the nomination

and confirmation, consummates the appointment so far as the appointing power is concerned. Marbury v. Madison, 1 Cr., 137; United States v. Le Baron, 19 How., 78; Glavey v. United States, 182 U.S., 595; 4 Op. Atty. Gen., 218. Prior to such consummation the appointee can not accept or hold the office and is not entitled to the salary attached thereto." 27 Comp. Dec. 861, 862.

In the second of these decisions which arose on the question of determining for pay purposes the effective date of appointment of a Federal District Court Judge, the Comptroller stated:

"It is well settled that officers appointed by the President by and with the advice and consent of the Senate, are entitled to compensation not necessarily from the date of the commission issued by the President, but from the date of acceptance of the appointment after the issuance of the commission. In other words, before compensation becomes payable in such cases there must be some affirmative action on the part of the nominee to show his acceptance of the appointment after the issuance of the commission by the President; and the date on which such affirmative action is taken determines or fixes, as a general rule, and in the absence of statutory provision otherwise, the commencement of the officer's right to salary." 20 Comp. Gen. 90, 91. (August 14, 1940).

4. Although the second cited decision of the Comptroller General would require for pay purposes an acceptance of the commission by the Presidential appointee in order to determine his entitlement to salary, this would not appear to be necessarily controlling in [REDACTED] case in establishing the effective date of his appointment for purposes of entitling him to the military pay and allowances for a particular rank or grade. In other words, the rule requiring acceptance of the commission and the formal oath of office for salary entitlement should not necessarily apply for purposes of establishing the rank or grade which an individual held at the time of appointment. Accordingly, it would be my opinion that the date on which the President issued General Cabell's commission as Deputy Director would be determinative of the rank and grade which he held at the time of appointment under the above-quoted section of the recent amendment to the National Security Act.

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